No. 13,887

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JEWEL HAWKINS,
Appellee.

On Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

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The statement of fact as to the issues involved in the Appellant's Brief, on pages 1, 2 and 3, are apparently correct, and the jurisdictional allegations therein are admitted, and the question presented is clear, except that it should include Sections 3670 and 3671, of the Internal Revenue Code, as they are set forth on page 4 of Appellant's Brief. We must disagree with the statement of fact in a few very limited instances. Especially, there was no proof that on December 27-28, 1949, the Collector of Internal Revenue received the Commissioner's assessment lists containing assessments of withholding and Federal Insurance Contributions Act taxes against Lawrence Savage for the

taxable quarter ending September 30, 1949, totaling $2,711.90, plus penalties and interest, and notified Savage of the assessments and demanded payment, because this statement is not founded upon any adequate testimony or evidence. Also, Exhibits 1 and 2 introduced by the Appellant, if properly admitted, would lead one to believe that demand was made, although no proof thereof is in the record. We contend that neither of the liens were properly perfected and that no demand was ever made of the taxpayer for the payment of the taxes referred to in the liens. However, we do not think it will be necessary to resort to those contentions in determining this law suit, and that the same should be affirmed upon the reasons given by the late Hon. Anthony J. Dimond in his opinion, now found in 110 Fed. Sup. 619, also set out in detail in the Transcript of Record in this case, commencing on page 57 and extending over to page 71. The contention that Congress did not have the power to accord special treatment to the claims of residents of Alaska will be carefully analyzed in this brief. We wish to first take the cases relied upon by Appellant and attempt to give this Honorable Court our contention in relation thereto.

Apparently Appellant relies principally upon *United States v. Security Trust & Savings Bank, Executor, et al.,* 340 U.S. 47. The late Judge Dimond, our District Judge, analyzed the distinction between that case and our case and considered it fully and completely in his opinion, and after re-reading it again and again I feel confident that this California

case does not apply, due to the fact that the Supreme Court of the United States took a ruling of the Supreme Court of California holding that the attachment lien under the laws of that State was contingent or inchoate, and on page 49 of this decision you find these words:

> "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to reexamination by the Court. *On the other hand, if the state court itself describes the lien as inchoate, this classification is 'practically conclusive.' Illinois v. Campbell,* 329 U. S. 362, 371. The Supreme Court of California has so described its attachment lien in the case of *Puissegur v. Yarbrough*, 29 Cal. 2d 409, 412, 175 P. 2d 830, 831, by stating that, 'The attaching creditor obtains only a potential right or a contingent lien * * *' Examination of the California statute shows that the above is an apt description. The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from every becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a lis pendens notice that a right to perfect a lien exists.
>
> "Nor can the doctrine of relation back—which by process of judicial reasoning merges the at-

> tachment lien in the judgment and relates the judgment lien back to the date of attachment—operate to destroy the realities of the situation. When the tax liens of the United States were recorded, Morrison did not have a judgment lien. He had a mere 'caveat of a more perfect lien to come.' *New York v. Maclay,* 288 U. S. 290, 294." (Emphasis ours.)

The California law classifies the lien of an attachment as being inchoate and contingent, depending for its validity on the rendering of a judgment thereon, while the Alaskan law on attachment is an act of the United States Congress, a special act for Alaska that has been in effect for years, and by the very act itself places the attaching creditor in exactly the same position as an innocent purchaser for value.

We find in A.C.L.A. 1949, Section 55-6-67, which is an act of Congress especially passed as the laws of Alaska, which reads as follows:

> "§55-6-67. PLAINTIFF'S RIGHTS AGAINST THIRD PERSONS: LIABILITY OF PERSONS FAILING TO TRANSFER PROPERTY TO MARSHAL. From the date of the attachment until it be discharged or the writ executed, *the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached,* subject to the conditions prescribed in the next section as to real property. Any person, association, or corporation mentioned in subdivision three of the section last preceding, from the service of a copy of the writ and notice

> as therein provided, shall, unless such property, or debts be delivered, transferred, or paid to the marshal, be liable to the plaintiff for the amount thereof until the attachment be discharged or any judgment recovered by him be satisfied." (Emphasis ours.)

The Courts of Alaska have recognized this as the law since its passage. See *Meredith v. Thompson,* 4 A. 360, which case held:

> "The attaching plaintiff is deemed a purchaser in good faith for value from the time of the actual levy of the writ of attachment or execution."

Another case, *Cowden v. Wilde Goose M. & T. Co.,* 199 F. 561, this Ninth Circuit Court held that:

> "Where subsequent to the attachment of the property of a mining corporation a receiver of its property was appointed in an action to which the attachment plaintiffs were not parties, the mere appointment of the receiver did not divest the liens acquired by said plaintiffs *who must be deemed purchasers in good faith and for value under this section."* (Emphasis ours.)

It seems that this federal statute, especially passed as the governing laws of Alaska, controls as to priorities in this case, and the Supreme Court case, construing the California statutes (340 U. S. 49) has no bearing on this case before the Court.

The other case that Appellants apparently relied upon for reversal is *MacKenzie v. United States,* 109 F. 2d 540. This case was decided by the Ninth Cir-

cuit on February 5, 1940, and construes the exact same California attachment statute as was construed by the United States Supreme Court in the case of *United States v. Security Trust & Savings Bank, Executor, et al.,* 340 U.S. 47. All explanations concerning the Supreme Court case apply equally to the *MacKenzie* case, and therefore I will not quote at length therefrom. That case holds that the lien of the government for the taxes shall not be valid as against any mortgagee, purchaser or judgment creditor until notice thereof has been filed by the collector in accordance with the law of the state or territory in which the property subject to the lien is situated, whenever the state or territory has by law provided for the filing of such notice. It will surely be conceded that the statutes of Alaska provide for the filing of the tax lien in the office of the United States Commissioner, ex-Officio Recorder of the precinct in which the property is situated. Therefore, the lien of the United States did not attach until the tax liens were filed, which was after the attachment lien had already become complete.

In the case relied upon by Appellant, *New York v. Maclay, et al., Receivers, et al.,* 288 U.S. 290, this case is adverse to the contention of Appellants if analyzed in its true sense. However, it did hold that debts due by an *insolvent* corporation to the United States have priority over claims of a state for franchise tax due, but not liquidated.

We cannot see how this case could possibly be of assistance to Appellant in the case at bar.

In the above cited case reference is made to *Thelusson v. Smith,* 2 Wheat. 396, 426, and we quote a part thereof as follows:

> "The ruling there was that the general lien of a judgment upon the lands of an insolvent debtor is subordinate to the preference established by the statute *unless seizure by a marshal or some other equivalent act has made the lien specific and brought about a change of title or possession."* (Emphasis supplied.)

In the case at bar a seizure had been made by attachment prior to the filing of the tax lien, and the money had been attached by the marshal quite some time prior to the United States perfecting its tax lien. The above cited case, at least indicates, that if seizure had been made and the lien made specific, as in the case at bar, it would prevail over the tax lien created later by the Appellant.

We have carefully examined the case of *Allen v. Myers* cited by Appellant and quoted from on page 11 of their brief. While the quotation there stated is quoted correctly from this case, yet they overlooked or failed to quote the few lines above on page 118, which are: "In legislating for Alaska, 'Congress exercises the combined power of the general and of a state government,' " and cite quite a number of cases.

It is our contention and was so found by the opinion of the late Hon. Anthony J. Dimond that the attachment statute referred to in his opinion was the act of the Congress of the United States and a special act creating the laws of the Territory of Alaska, and is

still in full force and effect and is controlling in this case because by the laws of the United States affecting the Territory of Alaska, an attaching creditor becomes an innocent purchaser for value as provided in said statute, 56-6-67, A.C.L.A. 1949.

The contention of Appellant that the act of Congress in passing the attachment laws for the Territory of Alaska amounted to an act of the Territorial Legislature, if not carefully considered might sound tenable. But, its contention that *Allen v. Myers,* 1 Alaska 114, was controlling in the matter would, of course, be lightly considered, as the *Allen v. Myers* case is not in point with the facts here.

It is our contention that Congress acted within its general powers in passing the attachment act referred to by the Hon. Anthony J. Dimond in this case, and that Congress has more power in passing laws for the Territory of Alaska than it has in passing laws for the United States, in that only a very few paragraphs of the Constitution of the United States restrict Congress in the passing of laws for any Territory, including Alaska.

A long time ago, in the old case of *Downes v. Bidwell,* 182 U.S. 244, Mr. Justice Brown wrote one of the most enlightening opinions of all times on this question. He considered all of the previously decided cases, including *DeLima v. Bidwell,* the famous *Dred Scott* case, and a large group of other cases. The *Downes v. Bidwell* case has recently been cited with approval in *Hooven and Allison Co. v. Evatt,* 324 U.S. 652, a part of said recent case we will later cite.

In the *Downes v. Bidwell* case, the United States Supreme Court held that "under the Constitutional power to make treaties, there was ample power to acquire territory and to hold and govern it under laws to be passed by Congress * * *" (page 254).

On page 255, we find these words in this famous opinion:

> "The administration party, through Mr. Elliott of Vermont, replied to this that 'the States, as such, were equal and intended to preserve that equality; and the provision of the constitution alluded to was calculated to prevent Congress from making any odious discrimination or distinctions between States. It was not contemplated that this provision would have application to colonial or territorial acquisitions.'"
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> * * * * * * *
>
> "These statutes may be taken as expressing the views of Congress, first, that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the Union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the Constitution, Art. I, sec. 9, that declares that no preference shall be given to the ports *of one State over those of another.* It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of States within the meaning of the Constitution." (Emphasis ours.)

On page 256 of this same opinion, we find:

> "The very treaty with Spain under discussion in this case contains similar discriminative pro-

visions, which are apparently irreconcilable with the Constitution, if that instrument be held to extend to these islands immediately upon their cession to the United States. By Art. IV the United States agree 'for the term of ten years from the date of the exchange of the ratifications of the present treaty, to admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States'—a privilege not extending to any other ports. It was a clear breach of the uniformity clause in question, and a manifest excess of authority on the part of the commissioners, *if ports of the Philippine Islands be ports of the United States.*" (Emphasis ours.)

Then on page 257, and extending over on to page 258, we find the following:

"So, too, on March 6, 1820, 3 Stat. 545, c. 22, in an act authorizing the people of Missouri to form a state government, after a heated debate, Congress declared that in the territory of Louisiana north of 36° 30′ slavery should be forever prohibited. It is true that, for reasons which have become historical, this act was declared to be unconstitutional in Scott v. Sandford, 19 How. 393, but it is none the less a distinct annunciation by Congress of power over property in the territories which it obviously did not possess in the several States.

"The researches of counsel have collated a large number of other instances, in which Congress has in its enactments recognized the fact that provisions intended for the States did not embrace the territories, unless specially mentioned. These

are found in the laws prohibiting the slave trade with 'the United States or territories thereof;' or equipping ships 'in any port or place within the *jurisdiction* of the United States;' in the internal revenue laws, in the early ones of which no provision was made for the collection of taxes in the territory not included within the boundaries of the existing States, and others of which extended them expressly to the territories, or 'within the exterior boundaries of the United States;' and in the acts extending the internal revenue laws to the Territories of Alaska and Oklahoma. It would prolong this opinion unnecessarily to set forth the provisions of these acts in detail. It is sufficient to say that Congress has or has not applied the revenue laws to the territories, as the circumstances of each case seemed to require, *and has specifically legislated for the territories whenever it was its intention to execute laws beyond the limits of the States.* Indeed, whatever may have been the fluctuations of opinion in other bodies, (and event this court has not been exempt from them,) Congress has been consistent in recognizing the difference between the States and territories under the Constitution." (Emphasis supplied.)

On page 266, the Court, in discussing the famous opinion of Chief Justice Marshall, said:

"He held that the judicial clause of the Constitution, above quoted, did not apply to Florida; that the judges of the Superior Courts of Florida held their office for four years; that 'these courts are not constitutional courts in which the judicial power conferred by the Constitution on the gen-

> eral government, can be deposited;' that 'they are legislative courts, created in virtue of the general right of sovereignty which exists in the government,' or in virtue of the territorial clause of the Constitution; that the jurisdiction with which they are invested is not a part of judicial power of the Constitution, but is conferred by Congress, in the exercise of those general powers which that body possesses over the territories of the United States; and that in legislating for them Congress exercises the combined powers of the general and of a state government."

In referring to the Courts of the Territory of Florida, this famous jurist stated on page 267:

> "We must assume as a logical inference from this case that the other powers vested in Congress by the Constitution have no application to these territories, or that the judicial clause is exceptional in that particular."

Then, again at the bottom of page 267, extending over on to page 269, we quote:

> "That the *power over the territories* is vested in Congress without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 422, and in *United States v. Gratiot,* 14 Pet. 526. So, too, in *Mormon Church v. United States,* 136 U.S. 1, in holding that Congress had power to repeal the charter of the church, Mr. Justice Bradley used the following forceful language: 'The power of Congress over the territories of the United States is general and

plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the Territory northwest of the Ohio River, (which belonged to the United States at the adoption of the Constitution,) is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete * * * Doubtless Congress, in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress

derives all its powers, than by any express and direct application of its provisions.' See also, to the same effect, *National Bank v. County of Yankton,* 101 U.S. 129; *Murphy v. Ramsey,* 114 U. S. 15." (Emphasis supplied.)

Quoting again from this case, on page 269, we find reference to the case of *Reynolds v. United States,* 98 U.S. 145:

"In Reynolds v. United States, 98 U. S. 145, a law of the Territory of Utah, providing for grand juries of fifteen persons, was held to be constitutional, though Rev. Stat. sec. 808 required that a grand jury empanelled before any Circuit or District Court of the United States shall consist of not less than sixteen nor more than twenty-three persons. Section 808 was held to apply only to the Circuit and District Courts. The territorial courts were free to act in obedience to their own laws."

Again on page 274, we quote from the same case:

"The power to prohibit slavery in the territories is so different from the power to impose duties upon territorial products, and depends upon such different provisions of the Constitution, that they can scarcely be considered as analogous, unless we assume broadly that every clause of the Constitution attaches to the territories as well as to the States—a claim quite inconsistent with the position of the court in the *Canter* case."

Then on page 285, in referring to the adoption of the Constitution of the United States, we find the following words.

"The question of territories was dismissed with a single clause, apparently applicable only to the territories then existing, giving Congress the power to govern and dispose of them."

* * * * * * *

"If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories, as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to States, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them."

In summing up this case, on page 287 these words are used:

"We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

"The judgment of the Circuit Court is therefore *Affirmed.*"

This famous case was referred to very recently in the case of *Hooven & Allison Co. v. Evatt,* 324 U.S. 652, and from page 673 thereof we quote:

"That our dependencies, acquired by cession as the result of our war with Spain, are territories

belonging to, but not a part of the Union of states under the Constitution, was long since established by a series of decisions in this Court beginning with *The Insular Tax Cases* in 1901; *De Lima v. Bidwell, supra; Dooley v. United States, supra,* 182 U. S. 222; *Downes v. Bidwell,* 182 U. S. 244; *Dooley v. United States,* 183 U. S. 151; and see also *Public Utility Commissioners v. Ynchausti & Co.,* 251 U. S. 401, 406-407; *Balzac v. Porto Rico, supra.* This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions. It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by Sec. 3 of Article IV of the Constitution 'to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.' *Dooley v. United States, supra,* 183 U. S. at 157; *Dorr v. United States,* 195 U. S. 138, 149; *Balzac v. Porto Rico, supra,* 305; *Cincinnati Soap Co. v. United States,* 301 U. S. 308, 323.

"In exercising this power, Congress is not subject to the same constitutional limitations, as when it is legislating for the United States. See *Downes v. Bidwell, supra; Hawaii v. Mankichi,* 190 U. S. 197; *Dorr v. United States, supra; Dowdell v. United States,* 221 U. S. 325, 332; *Ocampo v. United States,* 234 U. S. 91, 98; *Public Utility Commissioners v. Ynchausti & Co., supra,* 406-407; *Balzac v. Porto Rico, supra.* And in general the guaranties of the Constitution, save as they

> are limitations upon the exercise of executive and legislative power when exerted for or over our insular possessions, extend to them only as Congress, in the exercise of its legislative power over territory belonging to the United States, has made those guaranties applicable. See Balzac v. Porto Rico, supra. The constitutional restrictions on the power of Congress to deal with articles brought into or sent out of the United States, do not apply to articles brought into or sent out of the Philippines. Despite the restrictions of Secs. 8 and 9 of Article I of the Constitution, such articles may be taxed by Congress and without apportionment. Downes v. Bidwell, supra. It follows that articles brought from the Philippines into the United States are imports in the sense that they are brought from the territory, which is not a part of the United States, into the Territory of the United States, organized by and under the Constitution, where alone the import clause of the Constitution is applicable."

This clearly follows the established rule that Congress in legislating for the Territory of Alaska, and other territories, is not subject to the same constitutional limitations as when it is legislating for the United States.

We contended before the Hon. Anthony J. Dimond, trial judge, and still contend that the attachment statute effective in the Territory of Alaska was an act of Congress passed while acting in its general powers legislating especially for the Territory of Alaska, and is therefore a special act and that the

general act referred to by the appellants has no effect whatsoever on this special act of Congress created for Alaska. In support of that position, we wish to quote from *Rodgers v. United States,* 185 U.S. 83, and it seems to us that the first syllabus taken from this *Rodgers* case clearly follows the exact holding of the case and clearly outlines that decision. The first syllabus reads:

> "Where there are two statutes, the earlier special and the later general, (the terms of the general being broad enough to include the matter provided for in the special,) the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

Another case that holds the same thing is *George Washington v. Charles W. Miller,* 235 U.S. 422, 35 Sup. Ct. 119, 59 Law. Ed. 295, and quoting the opinion from 35 Sup. Ct., on page 122, we find the following statement:

> "In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (United States v. Healey, 160 U. S. 136, 146, 40 L. Ed. 369, 373, 16 Sup. Ct. Rep. 247; United States v. Great-

house, 166 U.S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; Ex parte Crow Dog [ex parte Kaug Gi-Shin-Ca], 109 U. S. 556, 570, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; Rogers v. United States, 185 U. S. 83, 87-89, 46 L. ed. 816, 818, 819, 22 Sup. Ct. Rep. 582); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized.

"No doubt there was a purpose to extend the operation of the Arkansas laws in various ways, but we think it was not intended that they should supersede or displace special statutory provisions enacted by Congress with particular regard for the Indians, whose affairs were peculiarly within its control. Taylor v. Parker, 235 U. S. 42, 59 L. ed. ....., 35 Sup. Ct. Rep. 22. See also Re Davis, 32 Okla. 209, 122 Pac. 547."

Another case holding the same thing is *Niagara Fire Insurance Co. of New York v. Raleigh Hardware Co.,* 62 Fed. (2d) 705, the seventh syllabus of which reads as follows:

"7.—Statutes—Where separate existing statutes relate to the same subjects, earlier being special

> and latter general, presumption arises that special was intended to remain in force as exception to general."

From the body of the opinion, we quote:

> "It is elementary that statutes are to be construed together when possible, and that repeals by implication are not favored. * * * The rule is well settled that 'where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general'. Washington v. Miller, 235 U. S. 422, 428, 35 S. Ct. 119, 59 L. Ed. 295; Rodgers v. U. S., 185 U. S. 83, 87-89, 22 S. Ct. 582, 584, 46 L. Ed. 816; Townsend v. Little, 109 U. S. 504, 512, 3 S. Ct. 357, 27 L. Ed. 1012."

The United States Supreme Court, a long time ago, in the old case of *Townsend v. Little and others,* 3 Sup. Ct. Rep. 357, actually decided our question here more directly in point than any of the cases cited. From page 362 of Volume 3 above referred to, we quote:

> "According to the well-settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the territory requiring

deeds generally to be executed with two witnesses."

As is the general rule laid down by the United States Supreme Court they hesitate to change an old ruling, or the adoption by the lower Courts of a rule effecting any statute. Now, the attachment statute in this case, above referred to, has been upheld for more than fifty years and each time that the matter has been before this Ninth Circuit Court of Appeals, it has been held to mean exactly as it states. One case in particular, the *Cowden v. Wilde Goose Mining & Trading Company,* 199 Fed. 561, decided by the Ninth Circuit Court of Appeals on October 7, 1912, upholds the statute literally. The third syllabus reads:

"3. Receivers (Sec. 77)—Attachment—Lien—Divestment.

"Carter's Ann. Code Civ. Proc. Alaska, Sec. 141, provides that from the date of an attachment, until it is discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property attached, real and personal. *Held* that, where a receiver was appointed for a corporation after its property had been attached in an action to which the plaintiffs in the attachment were not parties, such appointment did not divest the attachment liens."

Then, on page 566, we find these words:

"(3) The laws of Alaska also provide that:

" 'From the date of the attachment until it be discharged or the writ executed, the plaintiff, as

against third persons, shall be deemed a purchaser in good faith and for a valuable consideration of the property, real and personal, attached.' Carter's Alaska Codes, p. 174.

"As has been stated, the property sold under the executions in question was attached August 18, 1906, and the receiver was not appointed until August 13, 1907, and then in an action to which the plaintiffs in the attachment cases were not parties. The mere appointment of the receiver, therefore, did not divest the liens acquired by the attachments. High on Receivers, Sec. 440; People v. Finch, 19 Colo. App. 512, 76 Pac. 1120; Pease, Sheriff, v. Smith, Receiver, 63 Ill. App. 411."

Since this is a special law passed by the United States Congress more than 50 years ago, and all construction of said statute has been to uphold it, we are of the opinion and contend that Congress, in passing this statute, did an act under its general and plenary powers with no restriction in the Constitution against the passage of the law, and no general statute passed prior or subsequent would have any effect on this statute and the same remains a part of the organic law of the United States of America, effective in Alaska, and is controlling in all matters until repealed or modified by the Congress of the United States.

Appellants rely on the case of *United States v. Gilbert Associates, Inc.,* 345 U.S. 361. We will not try to analyze this case any further than to say that it has no application to the law involved in the case

at bar. On page 365 of the opinion, you find the statement:

> "*But since the taxpayer was insolvent, the* United States claims the benefit of another statute to give it priority, Sec. 3466 of the Revised Statutes, 31 U.S.C. (1946 ed.) Sec. 191, the provisions of which are set forth in the margin." (Emphasis ours.)

The act itself (Sec. 3466) is set out in the margin below and is prefaced with the words:

> "Whenever any person indebted to the United States is insolvent * * *"

Therefore, the case last cited is not in point with our case before the Court now.

We contend that the judgment is correct in holding that the appellee's attachment lien dated April 19, 1950, is a good, sufficient and valid lien and is prior in time and right to the government's subsequent tax lien, if, in fact, they have a lien, for the reason that Section 55-6-67 of the Alaska Compiled Laws, Annotated, 1949, states:

> "From the date of the attachment until it be discharged or the writ executed, the plaintiff as against third persons shall be deemed a purchaser in good faith and for a valuable consideration of the property, real or personal, attached, subject to the conditions prescribed in the next section as to real property."

Title 26, Section 3672, states that certain liens are invalid without notice to mortgagees, pledgees, *purchasers,* and judgment creditors, until notice thereof has been filed by the collector. The notice of tax lien was filed by the government on June 13, 1950, long after the appellee's attachment lien. Consequently, by reasoning afforded our Alaska statute, the appellee is deemed a purchaser in good faith and therefore would come under Section 3672 of Title 26, as quoted above, and therefore the appellee in the case at bar would have a lien prior in time and superior to the government's lien in this case.

The United States did not have a lien on the property involved herein (if at all they did have a lien, which we deny) until June 13, 1950, when said notice of government tax lien was filed with the United States Commissioner at Anchorage, Alaska, and that the appellee's attachment lien dated from April 19, 1950, was superior in right and time to this government lien.

It may be conceded that the effect and operation of a state lien in relation to a claim of priority by the United States is a federal question. However, in determining whether the lien under state law is sufficiently specific and perfected to defeat the government's priority, the federal court should give weight to the state court's characterization of the lien, although such characterization is not conclusive. *Illinois v. Campbell,* 329 U.S. 362; *U. S. v. Security Trust & Savings Bank,* 340 U.S. 47.

We repeat that in making its arguments, the government has relied greatly on the case of *U. S. v. Security Trust & Savings Bank,* supra, in which the Court characterized the lien acquired under the California statute relating to the attachment proceedings as being contingent or inchoate. But solely on the basis of this decision. That the Supreme Court based its decision entirely upon the characterization of the lien accorded to it by the highest Court of its birthplace, should not be subject to any doubt. In its discussion of this same decision, in the case of *Citizens Coal Company v. Capital Cleaners & Dyers, Inc., et al.,* 233 Pac. (2d) 377, the Court said:

> "The Supreme Court held that the federal tax liens were superior to the prior attachment lien *because the Supreme Court of California had described the attachment lien under its Code of Civil Procedure as a contingent inchoate lien.* The United States Supreme Court stated that, 'The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. * * * (But) if the state court itself describes the lien as inchoate, this classification is 'practically conclusive.' " (Emphasis supplied.)

Statements of federal Courts in recent decisions have been to the same effect.

In the case of *United States of America v. Michael P. Acri, et al.,* Civil No. 25,807, October 10, 1952, also cited in Commerce Clearing House, Inc., Vol. 5, of the 1953 Standard Federal Tax Reporter, Case No.

9104, now found in 109 Fed. Supp. 943, the United States District Court for the Sixth Circuit, in granting priority to an attachment lien under Ohio law, said:

> "The case of U. S. v. Security Trust & Savings Bank, supra, relied upon by the Government dealt with a California statute giving no such effectiveness to attachment proceedings and liens as does the Ohio statute."

The United States District Court for the Fifth Circuit had this to say in *Sunnyland Wholesale Furniture Co. v. Liverpool & London & Globe Ins. Co.,* 107 F. Supp. 405:

> "The government contends that notwithstanding the fact that the garnishment lien attached prior to the time of the fixing of its lien under 53 Stat. 448, as amended, 26 U.S.C. Sects. 3670, 3671 and 3672, that it is entitled to the money on deposit and points to United States v. The Security Trust & Savings Bank, 340 U. S. 47.
>
> "The case is hardly an authority here. It relates to an attachment lien under the California Code. In that case the federal tax lien was recorded subsequent to the date of the attachment lien but before the attaching creditor obained judgment. In that case, also, the state court, itself, describes the lien as inchoate, and the Supreme Court accepts that classification as practically conclusive. In that sort of a situation the attachment lien is contingent, and the United States tax lien is not defeated by a contingent inchoate lien prior in time."

And from the opinion on page 406, we quote at length:

> "The spirit of this statutory provision vitalizes the thought that those who hold valid liens, such as are mentioned in the statute, are not affected by government liens subsequently acquired.
>
> "The ordinary rule with reference to the preference of government claims over private claims has no application here. This case is ruled by the securing of the first lien. That first lien is not crippled nor made subordinate by the acquisition of a subsequent lien by the National Government.
>
> "See also United States v. 52.11 Acres of Land in St. Charles County, Mo., D.C., 73 F. Supp. 820, and United States v. Waddill, Holland & Flinn, Inc., 323 U. S. 353, 65 S.Ct. 304, 89 L. Ed. 294, where the reasoning of the court explains the validity, priority, and vitality of the lien family. Other cases that are helpful are Buerger v. Wells, 110 Tex. 566, 222 S.W. 151; Snyder Motor Company v. Universal Credit Corp., Tex. Civ. App., 199 S.W. (2d) 792; Board of Sur'rs. of Louisiana State University v. Hart, 210 La. 78, 26 So. (2d) 361, 174 A.L.R. 1366; Focke v. Blum, 82 Tex. 436, 17 S.W. 770; Ash v. Aiken, 2 Tex. Civ. App. 83, 21 S.W. 618; Holloway Seed Co. v. City National Bank of Dallas, 92 Tex. 187, 47 S.W. 95; Jobbers' Distributing Co. v. Goldstein, Tex. Civ. App., 265 S.W. 1085; Voelkel-McLain Co. v. First National Bank, Tex. Civ. App., 296 S.W. 970; Globe & Rutgers Fire Ins. Co. v. Brown, D.C., 52 F. (2d) 164; and Daniel v. East Texas Theaters, Tex. Civ. App., 127 S.W. (2d) 240."

From the foregoing, it may be observed that applicability of *U. S. v. Security Trust and Savings Bank,* supra, as an authority in determining the relative priorities of state and federal liens, is limited; and should be restricted to those cases where the subject local statute and/or expression of the highest state Court is similar in scope to that of California. Insofar as the general problem lien priority is concerned, adjudication should be based on the authority of *Illinois v. Campbell,* supra, and subsequent federal decisions having for examination state lien statutes broader in scope than that of the California statute.

Whether a "fully perfected and specific" state lien would defeat a subsequent tax lien claimed by the government is a question never determined by the United States Supreme Court, so far as we are able to ascertain, but there have been strong indications from the decisions of that Court in the affirmative. *Illinois v. Campbell,* supra; *United States v. Waddill Co.,* 323 U.S. 353; *In re Matter of Gilbert Associates, Inc.,* Supreme Court of New Hampshire, No. 4122, July 1, 1952.

In *Illinois v. Campbell,* supra, the Supreme Court states that in order to overcome the statutory priority accorded a federal tax lien, "the lien must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects as of the crucial time. These are: (1) the identity of the lienor, *United States v. Knott,* 298 U.S. 544; (2) the amount of the lien, *United States v. Waddill Co.,* 323 U.S.

353; and (3) the property to which it attaches, *United States v. Waddill Co.,* supra; *United States v. Texas,* supra; *New York v. Maclay,* supra. In the opinion of the Court, the Illinois lien before it was not sufficiently specific or perfected to defeat the government's priority, since it did not attach to specific property of the debtor.

The government argues that because the Supreme Court of the United States has consistently relegated state liens—inchoate though classified by their own Courts as being specific and perfected—to a priority secondary to that of federal tax liens, that an attachment lien created pursuant to the statute of the Territory of Alaska is inchoate in nature and possesses the same status. The fallacy of this argument may be easily demonstrated. With the exception of *United States v. Security Trust and Savings Bank of San Diego,* supra, not one of the authorities cited in support of this argument, cited in the case below or here, involved a state attachment lien. All were indefinite in at least one of the "three respects as of the crucial time". *Illinois v. Campbell,* supra. Is the attachment lien herein involved not wanting in any one of the three requirements? No question exists as to the identity of the lienor; nor is the amount of the lien subject to any doubt; and, specific funds have been set aside as the subject of the attachment.

United States v. Security Trust and Savings Bank of San Diego, supra, may be dismissed as an authority applicable to the issue herein involved. Since the

Supreme Court placed *sole reliance on a California state Court's characterization of its California statute,* the decision thereupon rendered is of limited weight, and much of the discussion in the nature of dicta. Other than the superficial resemblance which lien statutes ordinarily bear to one another, the California and Alaska statutes have nothing in common.

There is a further distinction in the case at bar and this California case in that the California case involved an attachment on real estate, whereas our case involves personal property of which the appellee, upon its valid attachment, took immediate and sole possession of the property, and according to the Alaska Compiled Laws, Annotated, 1949, Section 55-6-67, the appellee, upon an attachment, is deemed to be a purchaser in good faith for a valuable consideration, from the date of the attachment. The case of *Meredith v. Thompson,* 4 A. 360, and the other Alaska cases above cited, interpreted this statute as giving the attaching plaintiff the same standing and rights as a purchaser in good faith for a valuable consideration from the actual date of the levy of the attachment.

Cases granting priority to liens arising under local statutes of this character over federal tax liens subsequently created, are legion. In the case of *United States, et al. v. Yates,* 204 F. (2d) 399, decided after *Illinois v. Campbell,* supra, where a Texas attachment statute similar in effect to our own was involved, the Texas Court of Civil Appeals held that a specific

attachment lien, levied on or before the date on which the federal government fixed its tax lien on the proceeds of a sale of the attached proprty, was entitled to priority over the government's lien, *though the attaching creditor's claims were not reduced to judgment.* The Court also said:

> "* * * the attachment lien of * * * was specific and fixed upon the date of its levy, which date was prior to the date the Government fixed its lien for unpaid taxes under Sections 3670, 3671 and 3672 * * * of the Internal Revenue Code of the United States";

and cited the case of *Louisiana State University v. Hart et al., United States, Intervenor,* 26 Southern (2d) 361, which decision is directly in point and was cited in our brief in the Court below.

Another case concerning the same point is *In re Taylorcraft Aviation Corporation,* 168 F. (2d) 808, also decided subsequent to *Illinois v. Campbell,* supra. The Sixth Circuit Court had before it an Ohio statute, under which a mechanic's lien became effective as of the date of the first delivery of labor and material. The government had made assessments and demands upon the debtor for payment of taxes prior to the date upon which the last labor and material were furnished to the debtor, but notice of lien for taxes as required by Section 3672 of the Internal Revenue Code was not filed by the government until after the affidavit for mechanic's lien was filed as required by Ohio statute. The Court held *that the Ohio law determined the effectiveness of the local lien, subject to*

examination by the federal Courts, and that the mechanic's lien in the instant case was specific, attached to specific property, and was prior in time to the date upon which the federal tax liens became perfected.

In the case of *United States v. Michael P. Acri, et al.,* in the United States District Court for the Northern District of Ohio, Eastern Division, Civil No. 25,807, October 10, 1952, now published in 109 Fed. Supp. 943, we have a case decided by a federal Court subsequent to *United States v. Security Trust and Savings,* supra. In that case the debtor's personal property in a safe deposit box was attached and subsequent to that date the government filed notice of its tax lien. Under Ohio law, a valid lien of the requisite specificity was acquired on the debtor's property as of the date of the commencement of the attachment proceedings. The decisions of Ohio Courts had characterized such attachment lien as an "execution in advance", of equal standing with an execution lien, and to be treated as perfected at the time the attachment is made. The Court stated:

> "that the effect and operation of a state lien in relation to a claim of priority by the United States is a federal question. Illinois v. Campbell, 329 U.S. 362; U. S. v. Security Trust and Savings Bank, 340 U. S. 47. The federal court must determine whether the lien under state law is sufficiently specific and perfected to defeat the Government's priority, and in making such determination it should give weight to the state court's characterization of the lien, although such characterization is not conclusive."

To the same effect are the following cases: *Albert Klinghoffer, et ano. v. Peter's Ridgewood, Inc., et ano.,* in the City Court of the City of New York, County of New York, Calendar No. 56, November 10, 1950; *Petition of Gilbert Associates, Inc.,* in the Supreme Court of New Hampshire, No. 4122, July 1, 1952. (We trust the Court will forgive us for not being able to give better information as to where the above cases are found; but this is taken from a tax service and we can find no better citations in our available library.) *U. S. v. Canadian American Co., Inc., et al.,* 108 Fed. Supp. 206, is in point and and the holding is very similar. Also, the following case supports our contention: *In the Matter of Ann Arbor Brewing Company,* 110 Fed. Supp. 111.

The case of *Sunnyland Wholesale Furniture Co. v. Liverpool & London & Globe Ins. Co.,* 107 F. Supp. 405, decided by the Fifth United States District Court on October 7, 1952, is a decision resting squarely on the same set of facts as raised by the instant litigation. That case involved a garnishment under the Texas statute upon funds belonging to the debtor, which had been tendered into the registry of the Court. The Federal Government interpleaded, the government contending that notwithstanding the fact that the garnishment lien attached prior to the time of the fixing of its lien under Sections 3670, 3671 and 3672, of the Internal Revenue Code, that it is entitled to the money on deposit and points to *United States v. The Security Trust & Savings Bank,* 340 U.S. 47, supra. After dismissing the California case as an

authority in the proceeding before it (reason previously given in this brief), the Court went on to say:

> "It will be noticed that the United States statute mentioned above provides that, 'such (statutory) lien shall not be valid as against any mortgage, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector' in the office provided by the law of the state for such filing * * * prior to the securing of the garnishment lien.
>
> "The spirit of this statutory provision vitalizes the thought that those who hold valid liens, such as are mentioned in the statute, are not affected by government liens subsequently acquired.
>
> "The ordinary rule with reference to the preference of government claims over private claims has no application here. This is ruled by the securing of the first lien. That first lien is not crippled nor made subordinate by the acquisition of a subsequent lien by the national government."

II.

We contend that if the judgment is correct, the reason given by the trial judge in arriving at the conclusion is immaterial. If the judgment is correct under any theory of law, then the judgment and decision would be affirmed by this Court.

In the trial below, we presented to the Court another question that we believed, and now believe, to be good. However, the trial judge did not mention this contention, but decided the case on another

theory. But, this particular contention was briefed and urged to the Court:

A. That the United States of America, Intervenor, had no right to a lien in this case at all, for the reason that there was no proof at any time in the case of a demand having been made of the tax debtor for the payment thereof;

B. That the liens filed in the case were not filled out properly, not verified, did not amount to a lien within the law affecting property in the Territory of Alaska, and were, therefore, not binding against the plaintiff in this action. The dates of filing the suit, the attachment, the tax liens, and every proceeding, are covered by the opinion of the late Hon. Anthony J. Dimond, and without reiterating them here, we call the Court's attention to the opinion, commencing on page 57 of the transcript, and continuing on over to page 71.

C. We also call your attention to the fact that the record is silent as to the intervenor, United States of America, ever properly procuring service at all on the defendant in this action. The plaintiff filed an affidavit to obtain service by publication (Tr. 40), procured an order for publication (Tr. 38), and proceeded to get service by publication, and the motion by the plaintiff for a default judgment was filed (Tr. 50) and sustained (Tr. 51); but nowhere is there any indication and up to this time there is no judgment, in favor of the intervenor in this case. This should be fatal to

the intervenor, as it has no right to judgment of any kind in this case, this being a suit *in rem* and no affidavit filed as required by law to obtain service by publication, any act that intervenor did in furtherance of obtaining service would be void, because not based upon the filing of the necessary affidavit.

We will argue "A", "B", and "C" separately, commencing with "A":

A. THAT THE UNITED STATES OF AMERICA, INTERVENOR, HAD NO RIGHT TO A LIEN IN THIS CASE AT ALL, FOR THE REASON THAT THERE WAS NO PROOF AT ANY TIME IN THE CASE OF A DEMAND HAVING BEEN MADE OF THE TAX DEBTOR FOR THE PAYMENT THEREOF.

All that is required of this to sustain this position, is to carefully read the proceedings had before the late Hon. Anthony J. Dimond, as shown by the Transcript, page 86, and you will see that there is positively no testimony of an actual demand ever having been made for payment of the taxpayer, Lawrence Savage, d/b/a Lee Savage Paint Company.

The attachment of the Plaintiff-Appellee was long prior to the filing of any of the notices of tax lien, and even the Complaint of the Intervenor does not plead a demand for the payment of the taxes. We contend that this is an allegation necessary and must be supported by proof before the Government can sustain its tax liens. There is positively no evidence or allegation in the Complaint of Intervention of demand having been made, or that Savage waived that

condition precedent to the creation of a lien, to-wit: demand upon the taxpayer for payment of taxes upon behalf of the Government. The Plaintiff-Appellee objected to the introduction of either of the tax liens when the same were offered in evidence (Transcript—97): "I do object to the introduction of them for the reason that they are incompetent, irrelevant and immaterial, and not sufficient for creating any lien—that the notices were not sufficient to create a lien as of themselves and were not sufficient under the laws." To this objection, Mr. Winter, Attorney for the United States, stated: "If the Court please, we do not contend that they in any way add to our lien; in other words, our levy is our usual procedure, which is only our means of enforcing our already existing lien. It is merely to show that we attempted to collect from J. B. Warrack Company, and that is the reason we have intervened in this case, is because of the attachment * * *" (Transcript—97.) Thereafter, the Court allowed Plaintiff, Appellee here, separate objections and exceptions to each of the lien exhibits D, E and F. (Transcript—98.) There not having been one word of proof anywhere in the case of a demand for the payment of taxes, we feel confident that the lien is void for the reason that the demand for payment is a condition precedent to the creation of a lien. (See: 26 U.S.C.A., Internal Revenue Code, Sec. 3670.) Section 3671 provides that the lien arises when the assessment lists are received by the Collector, unless some other date is specified by law. Section

3672 provides that the lien shall not be valid against mortgagees, pledgees, purchasers or judgment creditors until notice thereof has been filed in the office provided by the law of the State for such filing (in Alaska, United States Commissioner's Office, Ex-Officio Recorder).

It should be carefully observed that the judgment rendered by the Hon. Anthony J. Dimond in the Court below (Tr. 78) gave to the Plaintiff-Appellee, a judgment for $2,341.87, affirmed the attachment raised, issued, and served, and sustained it in its entirety. By the judgment, J. B. Warrack Company was ordered to pay the Plaintiff-Appellee, $2,341.87, clearly showing the judgment rendered by the Court related back to the date of the attachment and affirmed the same as of the date the attachment was made, and the attachment was made long prior to any liens having been filed by the Intervenor, United States of America. The District Court has never yet rendered judgment for the Intervenor-Appellant in this case.

A lien is a creature of the statute and to create a lien, the statutory procedure must be followed. A lien can be created if, and only if, the laws are scrupulously followed. Section 3670, above cited, states:

> "Property subject to lien.—If any person liable to pay any tax neglects or refuses to pay the same *after demand,* the amount * * * shall be a lien in favor of the United States * * *". (Emphasis supplied.)

showing conclusively that the statute above mentioned does not anticipate the creation of a lien until a demand has been made, and in this case, no demand has been *pleaded* or *proven;* therefore, no lien.

In order to create a lien, there must be a statement of the amount of taxes due and owing and an unequivocal demand that the taxes be paid. Demand is the condition precedent to the creation of the lien. In *United States v. Pacific Railroad, et al.,* 27 Fed. Cases 399, we quote from the body of the opinion as follows:

> "Here the act that constitutes and creates the lien is the demand. Without the demand there can be no lien, but with a just and proper demand, made in the proper way, the officer creates a lien by the very act of making the demand."

A demurrer was sustained to the Complaint in the above mentioned case for failure to allege the act of Demand, the necessary condition precedent to the creation of a lien. Further on the Court held:

> "It is conceded that demand on behalf of the United States for the payment of taxes was necessary under the statute to create the lien and to bring it into operation."
>
> *In re Baltimore Pearl Hominy Company,* 294 Fed. 921, 923.

See also:

> *Johnson v. Western Union Telegraph Co.,* 53 N.Y.S. (2d) 867.

Further down we find these words:

> "The 'demand' required by Section 3670 has been held to be a condition precedent in order to create and bring the lien into operation."
>
> *United States v. Ettleson,* 67 F. Supp. 257, 258.

The last mentioned case was later reversed (See *U. S. v. Ettleson,* 159 F. (2d) 193), but not upon the question of demand being a condition precedent to the creation of a lien.

Then, Section 3672, Title 26, U.S.C.A., requires the proper recording of the lien.

We believe that on these grounds alone we are entitled to have this judgment affirmed.

B. THAT THE LIENS FILED IN THE CASE WERE NOT FILLED OUT PROPERLY, NOT VERIFIED, DID NOT AMOUNT TO A LIEN WITHIN THE LAW AFFECTING PROPERTY IN THE TERRITORY OF ALASKA, AND WERE, THEREFORE, NOT BINDING AGAINST THE PLAINTIFF IN THIS ACTION. PLEASE FORGIVE US FOR REPEATING THAT. THE DATES OF FILING THE SUIT, THE ATTACHMENT, THE TAX LIENS, AND EVERY PROCEEDING, ARE COVERED BY THE OPINION OF THE LATE HONORABLE ANTHONY J. DIMOND IN THIS CASE.

We call your specific attention to the fact that the laws of Alaska require a lien to be verified and we further call your attention to pages 30 and 32 of the Transcript showing the printer's note, to-wit: "Not Filled Out", and just a careful examination of the liens, exhibits A & B of Intervenor, shows that they

are not properly filled out for the purpose of recording and creating a lien, even if they had pleaded and proved a notice and demand. The Complaint in Intervention (Tr. 34) no where attempts to plead a demand for the payment, or any certification of the liens, but attached thereto copies exactly like exhibits A & B. (Tr. 29 and 31.) Therefore the Complaint in Intervention was insufficient to entitle intervenor United States to a judgment.

C. AND NOWHERE IS THERE ANY INDICATION AND UP TO THIS TIME THERE IS NO JUDGMENT IN FAVOR OF THE INTERVENOR IN THIS CASE. THIS SHOULD BE FATAL TO THE INTERVENOR, AS IT HAS NO RIGHT TO JUDGMENT OF ANY KIND IN THIS CASE, THIS BEING A SUIT IN REM AND NO AFFIDAVIT FILED AS REQUIRED BY LAW TO OBTAIN A SERVICE BY PUBLICATION, ANY ACT THAT INTERVENOR DID IN FURTHERANCE OF OBTAINING SERVICE WOULD BE VOID, BECAUSE NOT BASED UPON THE FILING OF THE NECESSARY AFFIDAVIT.

The record shows on its face that no affidavit was ever filed by the Intervenor-Appellant for the purpose of getting service on the Defendant on its Petition in Intervention, and no appearance has been made by the Defendant. Therefore, the matters mentioned in the Petition in Intervention should not have been even considered by the Court in arriving at its conclusion.

CONCLUSION.

Within the plain meaning of the Alaska statutes and decisions, attachment liens are given the same effectiveness as those arising under the Ohio and Texas statutes. Where affidavit and notice have been duly filed, and service and attachment made, they become perfected, as of the time the attachment is made. They are definite and specific within the meaning of *Illinois v. Campbell,* supra, and are entitled to priority over a tax lien of the federal government which has not become perfected by filing, or where the date of such filing is subsequent in time to the effective date of the attachment or garnishment. Such liens, having the characterization accorded by Section 55-6-67 of the Alaska Statutes and decision of Territorial Courts to the same effect, are clearly within the purview of Sec. 3672, of the Internal Revenue Code. Perverted interpretations of the local statute and decisions cannot be permitted merely on the authority of a decision rendered by a Court having before it a local statute and weight of authority diametrically opposed to the intent and meaning of Territorial legislation and decisions. Later federal cases indicate this decision is to be regarded as an aberration of settled law prior to its advent. *Sunnyland Wholesale Furniture Co. v. Liverpool & London & Globe,* supra; *United States v. Michael P. Acri,* supra; *Citizens Coal Co. v. Capital Cleaners & Dyers, Inc., et al.,* 233 Pac. (2d) 377.

The Appellee contends that her lien is prior in right and time to the Government's alleged lien claim;

that if the Government has a lien at all, said lien dates from June 13, 1950; when the notice of tax lien was filed with the United States Commissioner at Anchorage, Alaska, and that said lien is subsequent to the Appellee's lien and inferior in right and time; and that the judgment should be affirmed.

Dated, Anchorage, Alaska,
October 2, 1953.

Respectfully submitted,
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